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IN THE

Supreme Court of the United States

TERM, 1971

No. 70-113

FORD MOTOR COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA

and

THE ELECTRIC AUTOLITE COMPANY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR FORD MOTOR COMPANY

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Opinions Below

The opinion of the district court on the merits (App. 495a-517a) is reported at 286 F. Supp. 407. The opinion of the district court on relief (App. 770a-84a) is reported at 315 F. Supp. 372.

Jurisdiction

The judgment of the district court was entered on December 18, 1970. A notice of appeal to this Court was filed on February 16, 1971. Probable jurisdiction was noted on June 7, 1971. The jurisdiction of this Court is conferred

by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. See *United States v. Continental Can Co.*, 378 U. S. 441 (1964); *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962).

Statute Involved

The pertinent portion of Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 18, is as follows:

> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

The pertinent portion of Section 15 of the Clayton Act, 38 Stat. 736, as amended, 15 U.S.C. § 25, is as follows:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act . . . ."

Questions Presented

The court below held that the acquisition by Ford Motor Company ("Ford") of certain plug manufacturing assets of The Electric Autolite Company ("Electric Autolite") violated Section 7 of the Clayton Act. It ordered divestiture of the spark plug plant and the Autolite brand name, a 10-year injunction against Ford's manufacture of spark plugs, a 5-year ban on Ford's use or marketing of spark plugs bearing its own brand name, and a 5-year mandate

that Ford buy half its requirements of spark plugs from the purchaser of the divested plant, and that Ford buy such plugs under the brand name "Autolite."

The questions presented are:

1. Was not the holding that the acquisition violated Section 7 erroneous where (a) the acquisition increased actual competition by, among other things, increasing competition against the dominant General Motors Corporation and Champion Spark Plug Company, which together occupied more than 80% of the market at the time of the acquisition, and (b) the only adverse possibilities hypothesized by the court were purely theoretical?

2. Even if it is assumed that Section 7 was violated:

(a) Was the relief not improper where among other things:

(i) The effect of such relief is to destroy Ford's actual competition, to forestall its future competition, and to invite the dominant General Motors and Champion to fill Ford's 19% share of replacement sales?

(ii) The relief was fashioned in an effort to restructure the entire industry at the expense of Ford, although Ford's acquisition had not caused the historical structure of the industry and although the two dominant companies, not before the court, will be left free to entrench and extend their dominance?

(b) Was the court entitled to order injunctions that would lessen competition and interfere with basic proprietary rights by barring Ford's reentry as a manufacturer for 10 years, depriving Ford of the use of its own name on its spark plugs for 5 years, and otherwise eliminating Ford's actual and potential competition?

(c) In rejecting alternative forms of relief, did the court err in failing to weigh the grave risk that its

plan would not work; in failing to consider the devastating effect of failure of the plan on competition and on the welfare of an entire community as well; and in failing to give regard to the prejudicial effects of the relief granted upon important public interests including pollution control, technological progress, and true efficiencies?

Statement

A. Introduction

This is a civil antitrust action brought by the United States. It challenges the acquisition by Ford on April 12, 1961 of certain assets of Electric Autolite (co-defendant below) as violative of Section 7 of the Clayton Act. By the challenged transaction ("the acquisition"), Ford acquired, for a total consideration of $28 million: (1) Electric Autolite's spark plug plant at Fostoria, Ohio; (2) one of Electric Autolite's six battery plants, and (3) the "Autolite" trademark and limited distribution rights. (App. 499a; App. 67a-69a, Tr. 950-54.)[1] Electric Autolite, now ELTRA Corporation, has remained in the business of manufacturing and selling spark plugs, batteries and a complete line of automotive electrical parts under its brand name "Prestolite" and other brand names. (App. 499a-500a.)

In November 1961 the Department of Justice brought this suit. It charged that the acquisition may substantially lessen competition and tend to create a monopoly in pro-

[1] The facts in this Statement are largely undisputed. Unless otherwise indicated, they appear in one of the two opinions of the trial court. "App." refers to the Appendix submitted pursuant to Rule 36 of this Court. Excerpts from the transcript of the trial on the merits appear with the prefix "Tr." The prefix "R. Tr." refers to the transcript of the separate hearing on relief. The prefixes "G" and "F" refer to exhibits introduced by the Government and by Ford, respectively, in the course of the trial on the merits. The prefixes "GR" and "FR" refer to exhibits introduced by the Government and by Ford, respectively, during the hearing on relief. The prefix "GF" refers to stipulated exhibits.

duction, distribution and sale of spark plugs, batteries, ignition parts, and automobiles. (App. 3a-11a, Complaint.) After trial on the merits, the district court dismissed the charges as to ignition parts and automobiles. It found violations with respect to spark plugs and batteries. (App. 525a-71a.) For business reasons, the controversies regarding batteries have been resolved. The matters respecting batteries are therefore not involved on this appeal.

The court held a separate trial and rendered a separate opinion on relief. (App. 770a-84a.) On December 18, 1970, it entered a final judgment. (App. 785a-93a.) With respect to spark plugs, the judgment orders:

> (1) Divestiture of the Fostoria spark plug plant;
>
> (2) Divestiture of the "Autolite" name to the purchaser of the Fostoria plant;
>
> (3) A 10-year injunction against Ford's manufacture of spark plugs;
>
> (4) A 5-year injunction against Ford's use or marketing of spark plugs bearing a Ford brand-name; and
>
> (5) A 5-year mandatory injunction that Ford purchase half its annual spark plug requirements from the acquirer of the Fostoria plant and the "Autolite" name, and that it buy such plugs under the name "Autolite."

B. The Spark Plug

A spark plug is a relatively inexpensive but vital part of an expensive engine, purchased solely to obtain proper operation of the engine. It is installed as original equipment by the manufacturer of the engine or vehicle. After about 18 months of use it is replaced usually by a mechanic in performing an engine tune-up. Replacement occurs about five times during the life of the engine. (App. 548a-49a, 559a.)

"Although spark plugs look fungible to the layman, in fact they are delicately engineered for specific motors with special attention devoted to operating-temperature characteristics." (App. 545a.) Imperfections in manufacture or incorrect selection of a spark plug for original equipment or replacement in a particular engine may result in severe damage to the engine, increased air pollution and inferior vehicle performance, all of which reflect adversely upon the vehicle manufacturer. (See App. 545a-46a; App. 36a, Tr. 717; App. 722a-24a, R. Tr. 844-46; App. 224a, GF-1 ¶28-29.)

C. The History of the Spark Plug Industry

Because of unique characteristics of the spark plug industry, the only significant manufacturers of spark plugs have always been closely associated with manufacturers of automobiles. (App. 546a-47a, 549a-50a.) The market evolved as follows:

In 1909 General Motors acquired the assets (except for trade name) of the first firm in the industry, Champion Ignition Company ("Champion"). Champion was then the sole supplier of plugs to virtually all vehicle manufacturers in this country. (App. 228a, GF-1 ¶36.) At all times since that acquisition General Motors has manufactured its own spark plugs under the "AC" label and has supplied all of its own spark plug needs. For nearly 20 years General Motors also supplied the spark plug needs of Chrysler Corporation ("Chrysler"). (App. 547a.)

Champion Ignition Company, later known as Champion Spark Plug Company, recommenced manufacture of spark plugs under the "Champion" label. Champion was sole supplier of spark plugs to Ford for more than 50 years. (App. 547a.)

From 1909 until 1936 General Motors and Champion were the only significant domestic spark plug producers. They

accounted for all spark plugs installed as original equipment in vehicles and for more than 90% of all plugs produced and sold in the United States. (App. 547a; App. 229a, GF-1 ¶37.)

In 1936, Electric Autolite entered spark plug manufacturing at the request of and with the assured patronage of Chrysler. Electric Autolite had long been a major supplier of electrical and ignition parts to vehicle manufacturers. (App. 497a-98a, 547a; App. 229a, GF-1 ¶38.)

From the time of its entry to the time of the acquisition, Electric Autolite was a poor third in the spark plug market. It "was indubitably in a comparatively weak position." (App. 550a.) Electric Autolite accounted for approximately 15% of domestic spark plug production, as against Champion's 50% and General Motors' 30%. (App. 547a, 550a.) Only a "minute percentage of retailers; the bulk of which are filling stations, garages and tune-up shops, handled 'Autolite' exclusively; and too often it was the optional extra among repairmen who preferred to carry only one or two varieties." (App. 550a.)

D. The Stability of the Spark Plug Industry

For more than a quarter of a century and except as altered by the acquisition in question, the structure of the spark plug manufacturing industry had been static. (App. 549a-50a.) "The historical highlight of the business has been the stability of assembly-line sourcing." (App. 547a.) This stability derives from the inherent characteristics of the industry, the technology of the spark plug, and the nature of the demand.

1. *Cooperation between plug and vehicle manufacturers.* The spark plug industry is characterized by close and continuous cooperation between the vehicle builder and the maker of spark plugs for that vehicle. Because an improp-

erly engineered or poor quality spark plug may have significant adverse effects on the performance of the entire vehicle, the vehicle manufacturer insists upon approving any plug it uses for original equipment ("OE") installation. Extensive experimentation and testing are required to produce a plug that conforms to the characteristics of a new engine. The process begins as much as two years before an engine is mass produced. (App. 545a-46a; App. 26a-28a, Tr. 698-99; App. 224a-28a, GF-1 ¶28-35.) After the plug is developed, vehicle and plug makers spend substantial sums to insure against flaws resulting from faulty manufacturing processes. (App. 721a-22a, R. Tr. 838-39.) A former president of Electric Autolite described as follows its close cooperation with the vehicle manufacturer whose plugs it supplied: "[W]e acted almost as if we were a division of Chrysler, in having regular meetings with their engineering department and our engineering departments to a greater extent than is normal under general supplier relationships." (App. 51a, Tr. 854.)

Generally, spark plug manufacturers also offer replacement plugs for a wide variety of vehicles for which they do not supply the original equipment plug. These lines of replacement plugs are referred to as "all-make" lines. Replacement plugs that are not original equipment plugs approximate but almost never duplicate the characteristics of the OE plug.

The differences arise from the manner of production and selection. Whereas extensive testing is required for development of suitable OE plugs, such testing and development is not economically feasible for all-make plugs. Instead, the manufacturer attempts to find, from among its existing lines, a plug that has heat-range and other characteristics comparable to the plug that is used as original equipment.

All-make lines of replacement plugs normally function well. (App. 546a; App. 227a, GF-1 ¶35.) But they are almost never either identical or functionally equivalent to the

OE plug, and may not meet the standards of the vehicle maker. (App. 546a; App. 75a-77a, Tr. 967-69; App. 227a, GF-1 ¶35.) Accordingly, after the challenged acquisition and the shift in Chrysler's and Ford's OE sourcing, Ford required more than a year of testing and development before it was satisfied that Autolite plugs were suitable for OE installation in Ford vehicles. A comparable period was required for Chrysler to qualify Champion plugs for factory installation. These lengthy periods of development were necessary even though, prior to the challenged acquisition, Champion had offered certain plugs as suitable for replacement on Chrysler vehicles, and Electric Autolite had offered certain plugs as suitable for replacement on Ford vehicles. (App. 558a; App. 226a, GF-1 ¶34. See App. 130a-31a, Tr. 1378-80.)

At the time of its original entry into the spark plug industry, with Chrysler's assured patronage, Electric Autolite required five years to convert the Fostoria plant and to design, produce and qualify Autolite plugs for factory installation on all Chrysler-built vehicles. (App. 558a; App. 229a, GF-1 ¶38.)

2. *The original equipment preference.* A second characteristic of the spark plug industry is the propensity to replace spark plugs with the plug originally installed by the vehicle manufacturer. (This propensity was referred to below as the "OE tie.") The "overwhelming majority" of replacement plugs are chosen by mechanics, and "[s]ince the fear of serious damage haunts an improper choice of service unit" the mechanic "has a propensity to stick with the brand sanctioned by the builder of the motor." (App. 548a; see App. 779a.) There is technological justification for this preference. The OE plug is the only plug that was designed and engineered for and with the engine and is therefore the one most likely to provide optimum performance. (App. 232a, GF-1 ¶44.)

Absent considerations regarding the size of his inventory, a mechanic will stock all three OE brands and will replace plugs only with the original equipment plug. In doing so he has the assurance that he is installing a replacement plug that meets the vehicle manufacturer's standards. (App. 62a-63a, Tr. 935-36; App. 658a-59a, R. Tr. 380-82.) However, there is a general reluctance to carry large inventories. If the OE plug for the particular engine is not in his inventory, the mechanic tends to prefer the plug from the all-make line of another OE maker. This aspect of the OE preference derives from two sources. OE brands are usually available and OE makers have the largest variety of spark plug types from which to select a suitable alternate. (App. 548a; App. 729a-30a, R. Tr. 914-16.)

The OE preference makes status as an original equipment supplier a prerequisite to any appreciable participation in the spark plug replacement market. (App. 144a-45a, Tr. 1688-90; App. 184a-85a, Tr. 2160-61; App. 194a-96a, Tr. 2234-38.)[2] The court below recognized that, as a result of the OE propensity, "it has been absolutely necessary for the would-be spark plug maker to have his product installed in cars as original equipment if he is to have any chance of selling in the aftermarket." (App. 779a.) Lacking OE status, companies having well-known brand names with established national distribution systems, such as Firestone and Goodyear, have tried and failed to penetrate the replacement market. (App. 549a-50a; App. 136a-38a, Tr. 1453-56; App. 176a-81a, Tr. 2097-2105.)

3. *The original equipment price.* A third significant characteristic of the spark plug industry is the below-cost price at which plugs are furnished to the vehicle maker. Since OE supply gives the plug manufacturer access to the

[2] "[T]he Government concedes that American Motors, with approximately 5% of the automobile market, which uses 'Champion' and until 1961 employed 'Autolite' as well, is too small to 'support' a label by itself." (App. 549a.)

market for replacement of the OE plugs, the manufacturer readily bears a loss on the sale of plugs for OE installation. (App. 548a; App. 54a-56a, Tr. 876-78, 883-84; App. 79a-80a, Tr. 975-76; App. 132a-33a, Tr. 1387-88.)

The below-cost OE price originated in 1920. In that year, specifically to discourage Ford from manufacturing its own spark plugs, Champion offered Ford spark plugs for OE installation at $.0588 – commonly referred to as the "6-cent price."[3] Both General Motors and Electric Autolite followed the practice of charging this 6-cent price for plugs to be used as original equipment. Despite substantial increases in costs of manufacturing, plug producers continued to supply plugs at approximately 6 cents each. At the time of the challenged acquisition, 6 cents was approximately one-third of cost. (App. 547a-48a; App. 230a, GF-1 ¶40.)[4]

The 6-cent price naturally deters a vehicle manufacturer's integration into the production of spark plugs, for the vehicle manufacturer can purchase original equipment plugs at far less than it can make them. In addition, the entry of all possible manufacturers of spark plugs is deterred by the prospects of (1) continuing losses from OE sales and (2) the slow development of replacement sales from which such losses might be recouped.

4. *The delay in recoupment of OE losses.* Replacement demand is created slowly. There must ordinarily be sufficient vehicles on the road originally equipped with a given brand to justify the stocking of the brand by mechanics and retailers. This takes five to eight years. (App. 558a-59a.) In addition, stocking habits provide resistance

[3] Were it not for this artificial below-cost pricing, the rational course for an automobile manufacturer would have been to produce its own spark plugs, as it does other automotive parts that require highly specific engineering compatability. This was the course followed by General Motors in the infancy of the automotive industry.

[4] The 6-cent price is not applicable to plugs purchased by vehicle manufacturers for replacement purposes. (App. 132a, Tr. 1386-87.)

to change. Service stations generally carry a limited inventory. Those that carry one brand usually carry Champion or AC. Those that carry two brands almost invariably carry Champion and AC. Only when a third brand is stocked is Autolite likely to appear on the shelves. (App. 550a, 558a-59a; App. 139a-41a, Tr. 1572-76; App. 466a, F-38; App. 467a, F-39.)

5. *The replacement price.* A fourth significant characteristic is the lack of price sensitivity at the consumer level. The mechanic rather than the ultimate consumer generally selects the plug. (App. 548a; App. 195a-96a, Tr. 2237.) Morever, the plug is ordinarily replaced only in conjunction with the purchase of other parts and services as a part of a general tune-up, and the tune-up costs far in excess of the plugs themselves. (App. 609a-11a, R. Tr. 161-163.) As a result, price bears little or no relation to consumer choice.

E. Distribution of Replacement Plugs[5]

The vast bulk of replacement spark plug sales is made through the independent aftermarket. In the independent aftermarket, spark plug manufacturers distribute through warehouse distributors and jobbers, who in turn sell to service stations, repair shops and other retail outlets, including mass merchandisers who stock the OE brands along with their private brands. Vehicle dealers franchised by a vehicle manufacturer may buy replacement plugs through the independent aftermarket or from the vehicle manufacturer. (App. 464a, F-36.) As a result of the OE preference, the independent aftermarket is almost completely occupied by Champion (with 41% of replacement plug sales in 1969), AC (34%) and Autolite (19%). (App. 653a-54a, R. Tr. 349-51.)

[5] Channels of spark plug distribution are diagrammed in Ex. F-36. (App. 464a.)

In 1969 the cost of a spark plug to a warehouse distributor was approximately 40 cents. Suggested prices to jobbers and stocking dealers were approximately 51 cents and 72 cents, respectively. Suggested retail prices of all major OE brands were approximately $1.20; but such plugs were, and are, generally available at well below this price. (App. 777a; App. 761a, FR-13; App. 611a-12a, R. Tr. 169-70.) As indicated, price bears little relation to consumer choice.

In addition to the OE brands, many "private brand" plugs are sold for replacement purposes. More than 80% of these plugs are manufactured by Champion and ELTRA. (App. 767a, FR-42.) The private label brands are owned principally by oil companies, tire companies, and mass merchandisers such as Sears, Montgomery Ward, discount stores, and automotive parts chains. Private-label sales are made largely either over-the-counter or in connection with tune-up installations performed in service stations or service bays owned by or affiliated with the owner of the brand. In such service outlets the mechanic is directed to use the private brand despite the mechanic's preference for the OE brand and despite the greater range of spark plugs available from OE manufacturers. (App. 706a, R. Tr. 707.) With the growth of oil and tire companies, mass merchandisers, discount stores and chains and their service outlets, private brand sales have increased from 2.6% of replacement sales in 1961 to approximately 8% in 1969. ELTRA estimates that by 1980 the private brand market will expand to 145 million plugs per year or 17% of replacement plug sales. (App. 779a; App. 767a, FR-42.)

F. The Acquisition and its Background

In 1957, Chrysler began to integrate into the manufacture of most of the ignition parts that Electric Autolite had been supplying to it. (App. 498a; App. 217a-18a, GF-1 ¶15-16.) With regard to this development, the court found:

"This upheaval, along with several other disturbing considerations, led Autolite to foresee the possibility that it might shortly be left with a fixed-volume spark-plug plant but without a customer big enough to warrant the output; for, of the two major users besides Chrysler, General Motors made its own and Ford had been buying exclusively from another source for half a century. The brand name 'Autolite,' which had been raised to prominence by a multi-million-dollar investment in advertising, was also a subject of much anxiety. Due to the peculiarities of the industry, it could become nearly worthless for spark plugs if the company lost the Chrysler entree." (App. 498a-99a.)

• • • • •

"The spark-plug goodwill, established by millions of dollars of publicity, could become quite worthless should the Chrysler affiliation be lost and, with it, practically the only motivation anyone had for keeping 'Autolite' on his shelf. In addition, the plug facility at Fostoria could not be run on a reduced scale; thus, unless it was to be scrapped, an original-equipment customer was an economic *sine qua non*." (App. 551a-52a) (footnote omitted.)

In response to Chrysler's integration into the manufacture of various ignition parts, Electric Autolite attempted to increase its sales of replacement plugs to companies other than Chrysler so as to reduce its dependence upon Chrysler. However, its efforts to increase its replacement sales proved futile as against the sales programs of the entrenched Champion and General Motors. Next, Electric Autolite tried to obtain some of Champion's original equipment spark plug customers, including Ford. These efforts were equally unsuccessful. (App. 221a-22a, GF-1 ¶20; App. 59a-60a, Tr. 917-919; App. 64a-65a, Tr. 941-42; App. 77a-78a, Tr. 972-73.) "When a redoubled assault failed to improve

the aftermarket situation and Ford refused to dual-source to Autolite and Champion, the wiser decision seemed to be to get out while the getting was good." (App. 552a.)

Ford, meanwhile, had for 50 years purchased all of its spark plug requirements from Champion. In 1960, Ford's requirements amounted to approximately 16,140,000 plugs, purchased at about 6 cents each for OE installation, and approximately 22,534,000 plugs, purchased at about 38 cents each for redistribution to Ford franchised dealers. (App. 243a, GF-1 ¶63; App. 761a, FR-13.) Ford's purchases of plugs from Champion for redistribution amounted to approximately 13% of Champion's sales of replacement units. (App. 555a; App. 236a, 243a, GF-1 ¶51, 63.) Pursuant to 1953 decisions of the Federal Trade Commission, spark plug manufacturers were prohibited from discriminating in replacement plug prices between vehicle manufacturers and other distributors.[6]

During the 1950's vehicle owners increasingly patronized service stations, rather than franchised vehicle dealers, for automobile tune-ups. From 1951 to 1959, the franchised dealers' share of automobile tune-ups had declined from 50% to 26%. (App. 219a, GF-1 ¶17.) Unlike General Motors' all-make replacement line, Ford's replacement parts were primarily for Ford vehicles and were distributed only to Ford franchised dealers. (App. 675a-678a, R. Tr. 526-30; App. 219a-20a, GF-1 ¶19; App. 358a, G-8; App. 375a-77a, G-12.) To reach the growing service station market, Ford initiated an all-make replacement parts program under the name "Motorcraft" in 1958. (App. 296a, G-5; App. 634a-35a, R. Tr. 282-83; App. 677a-

[6] The same decisions sustained the differential between the OE plug price and the replacement plug price. See Champion Spark Plug Co., 50 F.T.C. 30 (1953); General Motors Corporation, 50 F.T.C. 54 (1953); The Electric Auto-Lite Company, 50 F.T.C. 73 (1953).

78a, R. Tr. 529-30.) But the Motorcraft program operated at a deficit. (App. 512a.)[7]

Electric Autolite approached Ford in 1960, and the challenged acquisition resulted. (App. 510a-11a; App. 66a-71a, Tr. 948-57.)

By the acquisition, Ford added spark plugs and batteries to its all-make line of ignition parts and other replacement parts, and it began marketing all of these parts under the "Autolite" name. (App. 500a.) Electric Autolite retained five of its six battery plants and a small spark plug plant. It constructed a new spark plug plant at Decatur, Alabama.[8] It marketed its automotive products under the "Prestolite" brand, which had previously appeared on its batteries. (App. 499a-500a.)[9] ELTRA is today an "aggressive spark-plug organization with respected expertise." (App. 552a.)

Following the acquisition, Champion replaced Electric Autolite as Chrysler's plug supplier, and both Champion and ELTRA have competed actively in private label sales. (App. 64a, Tr. 938; App. 763a, FR-40; App. 767a, FR-42.) Whereas prior to the acquisition Champion's policy was to supply OE customers under only the Champion brand, Champion has since made a "revolutionary concession" to Chrysler in furnishing a portion of Chrysler's requirements

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[7] In 1960, Ford's total independent aftermarket sales of all-make replacement parts were approximately $5 million; General Motors' sales in the independent aftermarket were approximately $285 million. (App. 394a, G-14; App. 634a-35a, R. Tr. 283.)

[8] In connection with the acquisition and in order to insure the continuation of ELTRA as a spark plug producer, Ford agreed to buy 12 million plugs over a two-year period, at replacement plug prices. (App. 278a, G-2.) Ford continues to supply ELTRA with most of the ceramic plug components it requires. (App. 111a-12a, Tr. 1316-18.)

[9] Although by the acquisition Ford gained access to Electric Autolite's distributors, Electric Autolite retained the right to approach its former customers and in fact did so successfully. (App. 67a-69a, Tr. 952-53.)

under Chrysler's "Mo-Par" private label at the historical OE price. (App. 553a; App. 39a, Tr. 737; App. 64a, Tr. 938.) Meanwhile, from 1960 to 1969 the Autolite replacement sales increased from 12.5% to 19% of all such sales, and the combined replacement sales of General Motors and Champion were rolled back from 83% to 75%. (Ex. G-161; App. 653a-54a, R. Tr. 349-51.)

G. The District Court's Decision

As the court found, the Government failed to prove that Ford was on the brink of integrating into the manufacture of spark plugs. Nonetheless the court held that the acquisition violated Section 7.

> (a) The court hypothesized that Ford had (i) "moderated all of Champion's replacement-sales policies directly" and (ii) therefore "must have touched" the replacement-sales policies of Autolite and General Motors derivatively. (App. 554a.)
>
> (b) The court concluded that the acquisition destroyed a theoretical opportunity of small plug fabricators to try to displace Champion as Ford's supplier, and thus destroyed "the motivation which Ford, even though long a Champion customer, gave other plug makers to work a change which could lead to deconcentration." (App. 563a-66a.) The court regarded the probability and feasibility of a small fabricator's displacing Champion as "not the issue." (App. 565a.)

The court decided that Ford must divest itself of the Fostoria plant and the Autolite name. Its judgment also prohibits Ford from manufacturing spark plugs for a period of 10 years and from using or marketing spark plugs bearing its own name for 5 years; and it requires Ford, for 5 years, to purchase 50% of its spark plug requirements from the divested plant under the Autolite name. (App. 778a, 780a-82a; App. 785a, Final Judgment.)

Summary of Argument

The acquisition increased competition in the spark plug market. Prior to the acquisition, two giant firms – General Motors and Champion – together occupied more than 80% of the market. The acquisition increased the competition against them and decreased concentration.

At the time of the acquisition, Ford was not on the brink of integrating into the market, as the court found. The court erroneously supposed that Ford had a moderating effect on Champion's aftermarket prices. There was not a shred of evidence that Champion's aftermarket prices were moderated. Rather, as the record shows, the result of the below-cost OE price was to inflate aftermarket prices, not to moderate them.

Nor did the acquisition foreclose any small fabricator from supplying spark plugs to Ford. Ford acquired assets of the smallest company capable of supplying it, leaving only the giant General Motors and Champion, whose further expansion would not serve antitrust objectives. Even the court recognized that the smaller plug fabricators had nothing but a theoretical "opportunity to try" to displace Champion and supply Ford. It swept aside considerations of probability and feasibility as "not the issue."

A Section 7 violation must be premised on real probabilities, not mere speculation. Here, speculation was the substance of the plaintiff's case. The court premised a violation on erroneous speculation (the "moderating effect") and a theoretical possibility (the "opportunity to try"). Concentrating on the acquisition's supposed effect on ephemeral potentials, the court failed to take account of the acquisition's actual and substantial beneficial competitive effects. The Government failed to satisfy its burden of proof, and the district court erred in finding a violation of Section 7.

The court further erred in devising relief. The final judgment imposes on Ford obligations and restraints far

beyond anything justified by the violation found. In ordering divestiture, the court failed to consider its consequences. In barring Ford's internal entry into the manufacture of spark plugs for 10 years and suspending Ford's right to use and market a Ford-brand spark plug for 5 years, the judgment not only would restrain competition but would inflict punishment upon Ford in a most extreme and destructive way.

In the circumstances here, divestiture cannot achieve any proper end. It cannot restore the potentials that the court feared were eliminated; and indeed, the ancillary injunctions would frustrate their creation. Divestiture will remove the actual competition of Ford, the only company yet successful in the competitive battle against the dominant General Motors and Champion. It will substitute a neophyte firm whose success is problematical. The effect will be either solidification of the ties between Fostoria and Ford, although severance was the object of this suit; or the demise of New Fostoria, for the fixed-volume Fostoria plant requires a large OE customer. The failure of New Fostoria to survive as a significant firm will invite engrossment by the already dominant General Motors and Champion.

Divestiture is not workable in this case and the judgment should be revised. Available alternatives would better serve the objectives of relief. In any event, the injunctions that interfere with the basic rights of grass-roots entry and the use of one's own name should be stricken as anti-competitive, unnecessary, punitive, and improper invasions of fundamental rights. In relief, as on the merits, the district court would sacrifice actual competition to intimations of shadows beyond the horizon. Competition, the public, and the industry's newest entrant are the victims. The court exceeded the bounds of its discretion, and the judgment should be reversed.

ARGUMENT

I

The court erred in holding that the acquisition violated Section 7.

A. The statute

Section 7 of the Clayton Act prohibits acquisitions whose effect may be substantially to lessen competition or tend to create a monopoly. The plaintiff has the burden to prove that the acquisition will probably have such a substantial effect. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962).

Section 7 deals in probabilities and substantialities, not speculation. *Ibid.* Mr. Justice Harlan has admonished:

> "[A]ssumption is no substitute for reasonable probability as a measure of illegality under § 7, see *Brown Shoe Co.* v. *United States*, 370, U.S. 294, 323, and . . . [t]he need for substantially cannot be ignored . . . ."[10]

Wherever the line between reasonable probability and pure speculation may be drawn, this case belongs clearly in the latter category. This case is founded on pure speculation, not on substance or probability. The Government failed to sustain its burden of proof, and the lower court's finding of a violation should be reversed.

B. The acquisition increased competition

For decades prior to the acquisition, the spark plug market was static. For 50 years General Motors had supplied itself, and Champion had supplied Ford and most other vehicle makers. At the time of the acquisition, General Motors had 30% of the total spark plug market and Cham-

[10] FTC v. Procter and Gamble Co., 386 U. S. 568, 581, 584 (1967) (concurring opinion).

pion had 50%. Since 1936 Electric Autolite had supplied Chrysler. It had 15% of the market at the time of the acquisition, but its relationship with Chrysler was in jeopardy of termination, and it feared that its large fixed-volume Fostoria plant would have to be scrapped. (App. 550a-52a.)

In 1961 Ford acquired the Autolite name and the Fostoria spark plug plant, relieving Electric Autolite of a "potential albatross." (App. 449a.) Electric Autolite (subsequently ELTRA) continued as a viable spark plug producer.

The acquisition was the first great spur to competition since Electric Autolite, sponsored by Chrysler, entered the market in 1936. It had these decidedly pro-competitive effects:

1. Ford, in place of the weaker Electric Autolite, entered into direct competition in the aftermarket with the entrenched General Motors and Champion. In 1960 General Motors and Champion accounted for 83% of replacement sales. As a result of Ford's vigorous competition that great market share was rolled back to 75%. (See p. 17 *supra*.) Ford is indisputably a more effective competitor against the dominant firms than was Electric Autolite.

2. For the first time in the history of the industry there was a fourth significant spark plug manufacturer, ELTRA. Freed of the large fixed-volume Fostoria facility, ELTRA manufactures original equipment and replacement plugs under the "Prestolite" name, supplies many private brands for replacement sales, and has the experience and skills to expand in both areas. (App. 552a-53a; App. 110a-11a, Tr. 1314-16; App. 119a, Tr. 1331-32; App. 127a-28a, Tr. 1363-64.)

3. The dominant Champion, occupying half the market, was displaced from its 50-year position as OE supplier to Ford. It became original-equipment supplier to Chrysler, the smallest of the "big three" automotive manufacturers. With this smaller base

in the original equipment market, Champion had the incentive and need to compete more vigorously in the sale of both Champion and private brand replacement plugs. (See pp. 16-17 *supra*.)

The court below disregarded all of the actual pro-competitive effects. On the basis of pure hypothesis and speculation, it held that the acquisition violated Section 7.

C. The court based a violation on speculative and erroneous hypotheses.

1. The hypotheses

The court premised a violation solely on the following:

(a) The Government failed to prove that Ford would have integrated internally into the manufacture of spark plugs but for the acquisition. (App. 557a-61a.) Nonetheless, the court viewed Ford as having the effect of a potential entrant. It assumed that Ford must have moderated replacement prices, and that the acquisition removed its imputed moderating effect.

(b) The court found that the acquisition removed a hypothetical "opportunity to try" of small plug fabricators to displace Champion and become Ford's supplier, and that it thus destroyed a motivation that might "lead to deconcentration." The court never found that such a small fabricator was likely to have become Ford's supplier, and indeed it expressly held irrelevant any consideration of feasibility or probability. (App. 563a-66a.)

2. Ford did not have a moderating effect, and the change in Ford's status from a possible entrant to an actual competitor increased competition.

a. Ford did not have a moderating effect; the 6-cent OE price had an inflating effect.

The trial court erroneously assumed that Ford must have moderated Champion's replacement prices and "must have

touched those of the others derivatively." From this assumption alone it drew the conclusion that Ford's failure to remain on the outside of the market tended to lessen competition. (App. 554a.)

There is not a shred of evidence in the record of more than 6,000 pages of transcripts, depositions and exhibits that Ford had a moderating effect on replacement prices. The most the court could muster in support of its conclusion was the speculation by a Ford executive of what Champion "could have done if Ford got too excited about integrating." (App. 555a. See App. 154a, Tr. 2004.) The testimony was purely hypothetical.[11] Contrary to the court's supposition, the evidence indicates that the below-cost OE price inflated replacement prices, from which Champion recouped its loss.

First, Ford was not on the brink of integrating into the manufacture of spark plugs; and the trial court so found. The following factors combined to deter Ford's integration:

> (a) Spark plugs for OE installation were available to Ford at less than one-third the cost of manufacture.
>
> (b) Ford lacked spark plug engineering and ceramic skills. (App. 148a, Tr. 1996.)
>
> (c) Ford had no appreciable distribution system in the independent aftermarket. (App. 397a, G-14.) Its Motorcraft program was already incurring large deficits.[12]
>
> (d) A minimum of five to eight years would be required from the commencement of OE installation "to create a real retailer interest in the product." (App. 559a.)

There was no showing that Ford was willing to give up the advantages of the 6-cent OE price and absorb the years

[11] Champion was not worried about Ford's imminent entry. See p. 24 *infra*.

[12] See pp. 15-16 *supra*.

of heavy losses that integration into spark plug manufacture would necessitate. The sole direct evidence was the testimony of Irving Duffy, the Ford executive who would have been directly responsible for such an expansion if it occurred. Mr. Duffy unequivocally testified that, because of the 6-cent price, Ford would not have integrated into the manufacture of spark plugs even if the challenged acquisition had not occurred. (App. 147a-49a, Tr. 1995-97; App. 152a-54a, Tr. 2002-04. See App. 560a.) The court properly held that the Government failed to sustain its burden of proof in this regard.

Second, Champion did not regard Ford as on the brink of integrating. It gave no more than passing thought to the prospect. Asked whether prior to the acquisition Champion suspected that Ford might build its own plant, a Champion executive replied:

> "A. Oh, we had some whisperings here and there over our fifty years of association that they might entertain the idea of going in the spark plug business. But we felt that if we could continue to service them as we were, at a price that was satisfactory to them, with a quality product, that we could retain their business, and we were successful in doing that for fifty years.
>
> Q. And the fact that you were selling them original equipment spark plugs below cost was a substantial factor in that, wasn't it?
>
> A. It was sort of an insurance." (App. 36a, Tr. 717-18.)

Third, even if Champion had regarded Ford as likely to enter the market, it would have had no incentive to reduce its replacement prices. Champion sold both OE and replacement plugs to Ford. As to replacement plugs, but not OE plugs, Champion was subject to a FTC decree prohibiting sales to Ford at a price lower than that offered to

similarly situated distributors. Similar decrees affected the entire industry.[13] Therefore Champion could not lawfully lower its replacement price to Ford without lowering its replacement price to other distributors. Ford's purchases of replacement plugs constituted only about 13% of Champion's non-OE sales. (App. 555a.) As the Government recognized (App. 211a, Tr. 2574-75), if Champion lowered its replacement price across the board in response to Ford, Ford would get a small benefit and Champion would suffer a disproportionately large loss. Accordingly, if any moderation were to occur, adjustment of OE price, not replacement price, would have been the logical course.

The record fails to show and indeed negates a moderating effect on replacement prices. It demonstrates the contrary: the below-cost 6-cent OE price necessitated recoupment of OE losses through replacement sales and thus had an inflating effect on replacement prices. Champion did inflate its replacement prices, did recoup its OE losses, and made profits among the highest in American industry. (App. 236a, GF-1 ¶52; App. 590a-594a, R. Tr. 105-14.)

b. The change in Ford's status from a possible entrant to an actual competitor did not lessen competition but increased it.

The court erroneously assumed that if Ford exerted a moderating effect from outside the market, its entry into the market would necessarily lessen competition by removing a pro-competitive force.

The contribution to competition in the creation of fresh actual competition against dominant companies is not to be ignored merely because it might possibly replace some remote moderating influence. No authority in this Court supports disregard of the increased actual competition.

United States v. *Penn-Olin Chemical Co.*, 378 U. S. 158 (1964), held no violation could be found upon entry of

[13] See note 6 at p. 15 *supra*.

a joint venture unless either both joint venturers would have entered the market independently or one would have remained at the sidelines threatening to enter.

In *FTC* v. *Procter & Gamble Co.*, 386 U. S. 568 (1967), the Court found a violation of Section 7 where a dominant firm in related markets acquired and entrenched the clearly dominant producer of a chemically indistinguishable product; the closest rival of the acquired firm was but one-third of its size; the acquisition brought overwhelming marketing and advertising power to the acquired company; and the market was theretofore characterized by low barriers to entry.

United States v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964), held illegal a merger of direct competitors, one of which was a limited monopolist and the other an unsuccessful bidder in the same market.

As in *Procter & Gamble* and *El Paso*, if the dominant company combines with a potential entrant that has moderated its prices, the moderating effect is simply absorbed and eliminated and is not replaced by any equally or more competitive force. Thus, if Ford had moderated Champion's prices and Champion had merged with Ford, an analogy to those cases might have been drawn. However, when the entering company combines with the smallest of the significant suppliers, it is likely to replace any remote effect with an immediate actual effect. The result is not to lessen competition by removal of a potential competitor, but to intensify competition by creation of a new and stronger actual competitor.

Such was the effect of Ford's entry. The market became more competitive. The market giants were subjected to Ford's actual competition from within. Ford succeeded in rolling back their aftermarket shares from 83% to 75%. Whatever market pressures Ford may once have placed on Champion were now exerted by Chrysler, Champion's new

OE buyer. Ford was of course moderated by its far larger competitors that controlled the industry.[14] And the number of competitors had increased by one.[15]

The materialization of actual competition in the place of highly theoretical potential competition increased and did not lessen competition. The judgment of the court to the contrary, which gave shadow priority over substance, should not stand.

3. The supposed disappearance of a theoretical opportunity to try to supply Ford has no significance to actual or foreseeable competition.

In 1960, as for half a century before, Champion was the sole and unchallenged supplier of spark plugs to Ford. Its product was the dominant, most popular, and best promoted spark plug in the nation. (See App. 126a, Tr. 1361; App. 135a, Tr. 1410.) It sold original equipment plugs to Ford at one-third of cost. But for the acquisition, Champion

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[14] The court said: "While Ford was able to check any avarice on the part of Champion, there is now no similar counterbalance as to Ford, which will not be disengaged regardless how extravagant its replacement prices may become." (App. 556a.) As noted above, Ford did not function as a check on Champion's "avarice." In any event, Ford is not in any position to be avaricious. It is the weakest member of a market dominated by Champion and General Motors. Sixty percent of service station outlets do not even carry Ford's Autolite brand; and Autolite is still "too often . . . the optional extra among repairmen who preferred to carry only one or two varieties." (pp. 7 and 10 *supra*.) During the ten years since the acquisition, Ford's replacement plug prices have never been extravagant. They have usually been lower than those of General Motors and Champion. (App. 761a, FR-13.) In light of the strong competition from the two dominant OE brands, avarice for the Autolite brand would be suicidal. Furthermore, competitive pressures preclude the assumption that Ford would jeopardize its stake in new car sales by antagonizing Ford owners with overpricing an inexpensive replacement part.

[15] Electric Autolite (ELTRA) remained a competitor, had potential that Ford helped to develop pursuant to the acquisition transaction, and has potential that may yet be furthered. (See pp. 16 and 21 *supra*.)

would probably still be the supplier to Ford. Nothing in the record indicates a greater probability. A Champion executive testified that his company was in no danger of losing the Ford account to another supplier. (App. 34a, Tr. 715.) Even the court seems to have recognized that because of the 6-cent concession and "Champion's virtually limitless ability to lower it," "Ford would not have deviated from its past sourcing in the foreseeable future." (App. 564a.)

Apart from Champion, whose expansion would be inconsistent with antitrust objectives, the only domestic company capable of supplying Ford that theoretically would be foreclosed from supplying Ford was General Motors, whose policy has been to supply no one but General Motors.

The record shows at most that while several companies would have liked to supply Ford, none could offer terms worthy of Ford's serious consideration. The Government stipulated: "For various reasons, none of the major vehicle manufacturers has ever given serious consideration to sourcing to any of these small spark plug manufacturers." [Referring to producers other than Champion, GM and Electric Autolite.] (App. 242a, GF-1 ¶62a)[16]

Thus, unable to rely on actual foreclosure, the court was constrained to rely on potential foreclosure. It frankly recognized that the opportunity to try to displace Champion and supply Ford was purely theoretical. Sweeping aside

[16] According to the district court, "Ford had hinted as far away as Germany that it would turn a receptive ear toward proposals for plugs under its own name." (App. 564a.) There were proposals from General Battery & Ceramic and from Robert Bosch in Germany to supply Ford at prices in excess of 26 cents per plug. (App. 490a-94a, F-82, F-83, F-85.) Such a price was, of course, far too high to justify Ford's serious consideration. (See App. 204a-05a, Tr. 2253.) Nor can it be thought that a better offer by such small firms might have succeeded. Champion could have made a better offer had it felt pressure to do so. Following its becoming supplier to Chrysler, it sold "Mo-Par" brand plugs to Chrysler for OE installation at the OE price. (App. 553a.)

feasibility and probabilities, and indeed holding them to be irrelevant, the court said:

> "Whether a firm like General Battery and Ceramic would ever come up with an arrangement to absorb enough of the temporary financial loss which would accompany purely internal growth to make a private-label venture attractive where integration would be precluded is not the issue, nor is there any evidence regarding even the present feasibility of such an alternative to in-house construction. What hurts is that the opportunity to try has been taken away." (App. 564a) (footnote omitted.)

No case decided by this Court appears to support the finding of a violation on these facts. There was concededly no actual foreclosure of smaller competitors as in *Brown Shoe Co.* v. *United States*, 370 U. S. 294 (1962). There, opportunity of Brown Shoe's smaller competitors to compete for virtually all of the business of the acquired retailer was foreclosed. As the Court recognized in the *Brown Shoe* case: "[T]he diminution of the vigor of competition which may stem from a vertical arrangement results primarily from foreclosure of a share of the market otherwise open to competitors. . . ." *Id.* at 328.

Here, no share of the market was otherwise open to any but the dominant firms.

The trial court's reliance on *United States* v. *Aluminum Company of America ("Alcoa")*, 377 U. S. 271 (1964), is misplaced. In *Alcoa* this Court found violative of Section 7 the acquisition of a small competitor by the dominant company in a concentrating market. The Court stressed the elimination of competition between the acquired and acquiring companies, and the increase in concentration through the acquisition. In contrast, the acquisition at bar was not horizontal, and it resulted in market deconcentration through the addition of a competitor.

This Court has never decided that the disappearance of a merely theoretical "opportunity," beyond the foreseeable future, and without regard to feasibility or probabilities, may support a violation of Section 7. We submit that it should not do so here.

Clearly the Government failed to sustain its burden of proof that the acquisition may substantially lessen competition. It rested on hypothesis and speculation. It disregarded probabilities and realities. The court ignored "[t]he need for substantiality,"[17] and its holding should not stand.

II

The court abused its discretion in ordering novel, excessive, ineffective, and anticompetitive relief.

A. Introduction

Having found a violation on the basis of theoretical possibilities, the court felt obliged to try to "erradicate the tendencies of the acquisition." (App. 774a.) It ordered divestiture without regard to the consequences of that order. Exceeding even the Government's requests (App. 572a-78a), it devised fresh shackles to keep Ford from being an effective competitor for many years. It would remove the actual competition and restrain the potential competition of the newest entrant, and open new opportunities to the industry's giants. The judgment not only tends to lessen competition. It imposes real and immediate restraints on competition.

The Final Judgment orders as follows:

> (1) It orders Ford, the only company that has been able to gain ground against the two industry

[17] FTC v. Procter & Gamble Co., 386 U. S. 568, 581, 584 (1967) (Harlan, J., concurring).

giants, to divest itself of the acquired spark plug manufacturing plant and the name "Autolite."

(2) It bars Ford from manufacturing spark plugs for 10 years, even by internal entry.

(3) It bars Ford, for 5 years, from marketing and even using spark plugs bearing a brand name owned by or licensed to Ford.

(4) It orders Ford, for 5 years, to buy half its requirements of spark plugs from the purchaser of the Fostoria plant ("New Fostoria") and under the Autolite name.

Divestiture is erroneous on the facts of the case, and the ancillary injunctions are in themselves anticompetitive, improper, and gravely injurious to the public and to Ford. Divestiture would remove Ford from the market, invite the dominant companies to move into the void, and create an uneconomic New Fostoria whose mere survival would be problematical.

The injunctions, piled one on another, supposedly in an effort to support the severed plant, each further restricts the competition that relief should ensure. They would restrain even Ford's internal entry for a prolonged period, and would suspend Ford's basic proprietary right to use its own brand name on the spark plugs to be used in its vehicles.

Competition is severely hampered, not aided, by such unprecedented judicial efforts to substitute wet nursing for bare-knuckled competition.

B. This Court can and should correct the errors of the trial court.

The fashioning of relief must be governed by two basic rules. First:

> "The key to the whole question of an antitrust remedy is of course the discovery of measures effec-

> tive to restore competition." *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326 (1961) (Brennan, J.)

A judgment that lessens competition will not fulfill this end.

Second: "Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive." *Ibid.* Correlatively, the relief must not be more severe than that necessary to give complete effect to the prohibitions of the statute. See *id.* at 327-28.

The court below violated both principles. First, the judgment as a whole and by its various parts imposes severe restraints on competition. Second, if the divestiture can be effective at all, its effectiveness will not depend upon the harsh ancillary restraints that among other things suspend Ford's right of internal entry and use of its own brand name; and at best those injunctions are punitive.

The trial court is of course vested with a range of discretion in fashioning antitrust decrees. However, this Court has recognized a special burden upon it to scrutinize relief ordered and "'to intervene in this most significant phase of the case when [it] concluded that there were inappropriate provisions in the decree.'" *Id.* at 323. As Mr. Justice Clark said, speaking for the Court in *International Boxing Club of New York* v. *United States*, 358 U. S. 242 (1959):

> "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus bypassing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done." *Id.* at 253. (Citations omitted.)

Where as here the trial court has exceeded the bounds of its discretion, this Court can and should correct the errors.

In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 600-01 (1951), this Court eliminated divestiture from the district court's decree; and in *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724-28 (1944), this Court eliminated a portion of a decree that was "too indefinite for judicial enforcement."

Alternatively, this Court has ordered the trial court to modify its judgment. It did so in *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 151-53, 155-56, 160-66 (1948), when it ordered the district court to eliminate prohibitions on activities that were not found to have resulted in monopoly or restrained trade, and to strike provisions that would entail close judicial supervision. In *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 408-35 (1945), the Court ordered modification or elimination of excessive and otherwise inappropriate provisions. Likewise it ordered the trial court to modify judgments in *United States* v. *Loew's Inc.*, 371 U.S. 38, 52-56 (1962), and *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88-95 (1950).

The trial court has egregiously erred in this case, and this Court should revise the judgment.

C. The judgment will lessen competition.

1. The judgment is not remedial, and even the trial court's stated objective will be frustrated.

The court predicated violation on elimination of Ford's postulated moderating effect and disappearance of the theoretical opportunity to try. The judgment was intended to "correct the situation" (App. 778a), but it does not.

The supposed moderating effect was premised on imminence of Ford's entry. The relief would bar Ford's entry for 10 years, after which additional lead time might be nec-

essary to penetrate the aftermarket.[18] The relief thus removes Ford as an actual competitor and deters its potential competition.

Nor would the judgment restore the theoretical opportunity of a small plug fabricator to try to sell to Ford. If New Fostoria is to survive, it must for the foreseeable future become and remain the OE supplier to Ford and secure and retain the benefits of such OE status in sales of replacement plugs. In no other way can the large fixed-volume Fostoria plant be sufficiently filled to warrant its operation.[19] In recognition of this need, the judgment not only ties Ford back to its severed Fostoria plant, but restrains Ford in a manner that will perpetuate the OE preference.

Thus, the judgment would frustrate the trial court's own objectives.

2. The relief ordered by the court will invite engrossment of the aftermarket by the industry giants.

The judgment deprives Ford, for five years, from marketing any spark plugs bearing a Ford brand name. The suspension of such right to use its own name removes a major incentive for Ford to market plugs.[20] The judgment was

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[18] The trial court found:

"[T]he unanimous consensus of experienced witnesses was that, a minimum of five to eight years would elapse from the point Ford started using the new elements in its cars until enough Ford-plug-equipped automobiles would be on the road to create a real retailer interest in the product." (App. 559a.)

[19] See p. 36 *infra*.

[20] At present Ford markets a line of replacement parts, including plugs, under a single Ford-brand name (now Autolite). If Ford cannot market spark plugs under the same name as the rest of its line, and must instead market plugs that bear the brand name of a manufacturer, its incentive to market any spark plugs at all is seriously weakened.

The testimony of the Government's economist indicates that he expected Ford's withdrawal would result from divestiture. (App. 617a-18a, R. Tr. 198-99.)

apparently intended to achieve this result, on the chance that New Fostoria, rather than General Motors and Champion, could pick up the accounts now held by Ford. The realistic prospect is the contrary.

At the time of the acquisition Electric Autolite accounted for 12.5% of spark plug sales in the aftermarket. The giant Champion and General Motors accounted for 83%. Ford, through its vigorous competition, succeeded in rolling back the vast aftermarket shares of these dominant firms to 75%, and Ford now occupies approximately 19% of the spark plug aftermarket. Thus, elimination of Ford from the aftermarket will create a 19% void.

The dominant firms, not New Fostoria, will move significantly into the void. They, and not New Fostoria, are equipped to do so. The bulk of the distributors presently buying Autolite spark plugs from Ford are customers of Ford because of Autolite's original equipment status and because Ford supplies a full-line of all-make parts through an extensive quick-service warehouse depot system. (App. 665a-67a, R. Tr. 441-43.)[21] Only through these and other inducements was Ford able to compete effectively with General Motors and Champion for sales of replacement plugs. One cannot expect that New Fostoria will be able to offer similar inducements sufficient to stave off the competition of General Motors and Champion.

Realism compels recognition that the giant firms, not New Fostoria, will be the principal beneficiaries of the

[21] If Autolite loses its OE status, its plugs will not be used by franchised dealers, who perform 35% of tune-ups on cars five years old or less, and will be in a precarious position with service stations, which perform 41% of such tune-ups and which usually stock Autolite only in combination with Champion and AC. (App. 139a-41a, Tr. 1572-76; App. 667a-70a, R. Tr. 458-61; App. 466a-67a, F-38, F-39; App. 762a, FR-27.) After 10 years of all-make promotion, it remains the fact that 75% of Autolite replacement plug sales are for replacement on the Ford vehicles originally equipped with Autolite. (App. 653a, R. Tr. 346.)

court's plan. The dominant companies will move in and expand their already dominant shares. The progress achieved by Ford's competition will be undone, and the market will return to the soft competition that existed before Electric Autolite's entry in 1936.

3. There is a grave risk that divestiture itself will fail.

The record well documents the inability of New Fostoria to exist without the support of the only available OE customer, Ford. The Fostoria plant was designed to serve a large OE customer and the resulting OE replacement market. It is an integrated plant and cannot be run at a substantially reduced capacity. The trial court recognized that even in 1961 OE status was essential to support Fostoria's fixed volume. Indeed, the threatened loss of such status precipitated the sale to Ford. (App. 498a-99a, 551a-52a; App. 73a, Tr. 963; App. 82a-83a, Tr. 982-83; App. 85a, Tr. 987-88.) Since 1961 the capacity of that plant has been more than doubled. It is now geared to Ford's OE and aftermarket needs and had a capacity of some 175 million plugs per year in 1969. (App. 713a, R. Tr. 774; Ex. FRC-57.)

The Government's economist and only witness at the hearing on relief conceded that status as an OE supplier is "the *sine qua non* of successful selling in the replacement after-market and that it's very difficult, apparently, to break this tie . . . ." (App. 589a, R. Tr. 103; see App. 605a, 607a, R. Tr. 145, 148.) He testified that New Fostoria would either have to supply OE plugs or change the OE preference of mechanics and consumers (App. 607a-08a, 615a-16a, R. Tr. 149, 181); that any new effort by New Fostoria to wean mechanics away from the OE preference would be opposed by the promotion of the preference by General Motors and Champion, and that if New Fostoria did not succeed against this opposition, GM and Champion would take over upon the termination of New Fostoria's

OE sales to Ford. (App. 608a-09a, R. Tr. 155-56.) Further testimony amply indicates that without OE status New Fostoria would lose the bulk of Ford-Autolite's aftermarket sales. (App. 181a-82a, Tr. 2106-07; App. 185a; Tr. 2161; App. 191a-92a, Tr. 2210; App. 196a, Tr. 2237-38; App. 665a-70a, R. Tr. 441-43, 457-61.)

Perpetuation of OE status with Ford was not at all the objective of the court. It would solidify the relationship that the court sought to sever. It would close the market that the court hoped it could open. It would defeat the court's efforts to promote a diversity of sourcing.

The court did not consciously seek to reinforce such ties. Rather, it nurtured a vain hope that its judgment might create a truly independent New Fostoria; but its hope is supported neither by historical precedent in the industry nor by the realities of competition in the market.

Two suggestions were made regarding New Fostoria's survival without OE status with Ford. One was by the Government's economist and was not adopted by the court. The other was advanced by the court in its opinion on relief.

The Government's economist suggested that New Fostoria attempt to compete through cutting prices. (App. 615a, R. Tr. 180.) However, he conceded that retail customers are peculiarly unmotivated by price in their purchases of spark plugs. (App. 609a-10a, R. Tr. 161-62.) Attempts to compete in terms of price have been completely ineffective. From 1958 through 1967, Electric Autolite and Ford offered Autolite spark plugs to warehouse distributors at prices below those of Champion and General Motors. (App. 654a-55a, R. Tr. 370; App. 761a, FR-13.) Neither Electric Autolite nor Ford incurred any sales benefit from these lower prices, and Ford experienced no adverse consequences when it increased its prices to the level of Champion and General Motors. (App. 654a-55a, R. Tr. 370, 374-75.)[22]

[22] Unsuccessful in price competition, Ford has increased its market share by improving its customer services and by shifting Ford

The economics demonstrate that a price reduction would have no meaningful effect. A manufacturer's price reduction calculated to add as much as 20 cents per plug to the retailer's profit would consume substantially all of the manufacturer's gross profit, and would result in an annual profit increase for the average service station of less than $36.00. (App. 655a-60a, R. Tr. 375-78, 380-84.)

The trial court pinned New Fostoria's hopes for survival on private label sales. Noting that sales of private label brands offered a future for ELTRA, it decided that such sales must therefore promise survival for New Fostoria. (App. 779a-80a.) But while private label sales support and can advance ELTRA, they are not extensive enough to provide significant support for New Fostoria. Primarily Champion, and secondarily ELTRA, account for most private label sales. Such sales amount to less than 50 million plugs annually, or 8% of spark plug replacement sales. They are expected to amount to approximately 145 million plugs in 1980, or 17% of replacement sales. (App. 767a, FR-42.) Even if New Fostoria could take a significant portion of such sales from Champion, ELTRA, and smaller manufacturers, the private brand sector is and will be far too small to support the Fostoria plant.

Moreover, if New Fostoria should successfully seek customers of ELTRA, the uncontroverted testimony is that ELTRA will be forced to cease spark plug production. (App. 621a-22a, R. Tr. 207; App. 710a-11a, R. Tr. 719; App. 713a-14a, R. Tr. 774-75.) The district court's judgment would destroy one private brand producer in its attempt to create another.

Finally, the trial court itself ostensibly recognized that New Fostoria could not survive without the support of Ford. It ordered drastic "supportive" injunctions barring Ford's internal entry, suspending its right to use its own

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franchised dealers' business from Ford to independent distributors that carry Ford's all-make parts line. (App. 635a-51a, R. Tr. 293-323. See App. 781a.)

brand name, and requiring Ford to buy 50% of its requirements from the purchaser of the plant under the Autolite name.[23] Each of the injunctions severely restrains competition. The effect will be to hamstring Ford for years and, at the end, either to insure the perpetuation of just the kind of market that the court tried to re-make or to invite the demise of the new firm and engrossment by the industry giants. The very severity of the ancillary restraints does more to demonstrate the tenuousness of New Fostoria's place in the market than to insure it.

Proper deference must of course be given to the exercise of discretion by the trial court in fashioning relief, but deference does not require acquiescence in relief so obviously arbitrary and indiscreet as that provided below.

4. The ancillary injunctions are improper, will severely restrain competition, and have no countervailing benefits.

a. The court erred in barring internal expansion.

The judgment would bar Ford's manufacture of spark plugs for 10 years, including manufacture through internal expansion. (App. 787a, Final Judgment ¶ V.) The injunction is a court-imposed restraint on trade and reflects the very antithesis of antitrust objectives.

The bar against entry accords with the trial court's recurring theme that "Ford may well have been more useful as a potential than it would have been as a real producer, regardless of how it began fabrication." (App. 563a.) Thus, the injunction reflects an improper exercise of the court's jurisdiction under Section 7 to prevent Ford's entry by any means.

Injunctive provisions barring internal expansion conflict with the basic economic premises of Section 7. Compare *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 370 (1963) (Brennan, J.):

[23] The restrictive injunctions are discussed at pp. 39-47 *infra*.

> "[S]urely one premise of an antimerger statute such as §7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."

The prohibition against Ford's internal expansion is unprecedented and should not be sustained. If ever such a prohibition can be justified, then certainly this Court must be assured that (1) if the ban is imposed, it will increase competition and eliminate, not perpetuate, the prohibited tendencies of the acquisition, and (2) competition cannot be restored by less drastic measures.

Neither test is met here. A ban on Ford's internal entry will tend to lessen competition and to perpetuate the tendencies sought to be eliminated. Any salutary effect of a threat of entry by Ford will be abrogated by an injunction that removes the threat. Any moderating effect Ford might otherwise cause will be frustrated. If the violation is sustained, Ford must be allowed to retain the right to enter the market, for the removal of this very potential was the principal defect of the acquisition as viewed by the court.

If a ban against entry could be justified at all, it could be justified only on the theory that it was reasonably necessary to support divestiture and that divestiture would restore competition. Here, even this justification is absent. First, divestiture will not restore competition.[24]

Second, the ban against entry is neither necessary nor appropriate to support divestiture. It is excessively harsh and punitive, and is impermissible. The new company is amply insulated by less drastic provisions in the judgment and by characteristics of the market itself. If New Fostoria cannot establish itself as a viable competitor with the aid of those generous protections, the injunction would merely delay the day of its demise.

New Fostoria finds ample support in the requirements provision of the judgment (which is itself anticompetitive

[24] See pp. 36-39 *supra*.

but a lesser evil), the continuing benefits of the OE status of the Autolite name on the millions of Ford vehicles manufactured during the last 10 years, and the built-in-insulation from Ford competition for at least the years necessary for a new plant to commence operation and penetrate the aftermarket.[25]

The normal forces of competition should be left free to work. Competition, not restraint, should govern the course of Ford's participation, and the injunction against internal entry should not stand.

b. The court erred in barring Ford from using its own name.

The judgment denies Ford the fundamental right to use its own name. Without explanation, without a suggestion by the Government, and without the benefit of testimony or argument, the district court decreed:

> "For a period of five (5) years from the date of divestiture . . . Ford shall not use or market in, or import into, the United States any spark plugs bearing a tradename or trademark owned by or licensed to Ford." (App. 787a-88a, Final Judgment ¶VI.)

This unprecedented restraint has no proper remedial purpose and constitutes a confiscation of Ford's property.

One's own name is property. The basic proprietary right to use one's name in business has long been recognized. *Howe Scale Company* v. *Wyckoff, Seamans & Benedict*, 198 U.S. 118 (1905); *Brown Chemical Co.* v. *Meyer*, 139 U.S. 540 (1891). *Cf. United States* v. *Tropiano*, 418 F.2d 1069, 1076 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970) (the right to pursue a lawful business is a property right

[25] To the extent that the injunction against entry may have been intended to preserve Ford as a customer, this is accomplished more directly by the requirements provision. To this extent the ban against entry is clearly superfluous.

within the protection of the Fifth and Fourteenth Amendments to the Constitution). Only when one has used his name to deceive or confuse the public has the right to use his name been limited. *Friend v. H. A. Friend & Company*, 416 F.2d 526 (9th Cir.), *cert. denied*, 397 U.S. 914 (1969); *S. C. Johnson & Son, Inc. v. Johnson*, 256 F.2d 129 (6th Cir. 1959).

An order requiring divestiture of property as relief for an antitrust violation may be proper if the property was the means or is the fruit of the violation and the divestiture is necessary to restore competition; but such an order is not otherwise permissible.[26] Thus in *Hartford-Empire Co. v. United States*, 323 F.S. 386 (1945), this Court found confiscatory and improper decretal provisions that would compel patentees of glass machinery to sell (rather than merely rent) the patented machines to all who applied, and would require the patentees to grant royalty-free licenses. The Court, by Mr. Justice Roberts, said:

> "Since the provisions of paragraphs 24 to 24 inclusive, in effect confiscate considerable portions of the appellants' property, we think they go beyond what is required to dissolve the combination and prevent future combinations of like character. It is to be borne in mind that the Government has not, in this litigation, attacked the validity of any patent or the priority ascribed to any by the Patent Office, nor has it attacked, as excessive or unreasonable, the standard royalties heretofore exacted by Hartford." *Id.* at 414.

Similarly, in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948), this Court held improper a ban on

[26] The statute (Section 15 of the Clayton Act, authorizing relief) should be construed so as to avoid constitutional questions. It should therefore be construed not to allow an arbitrary and indiscreet taking of property. Were the statute not so limited, a grave constitutional question would arise in this case.

joint theatre ownership except where (1) the acquisition of an interest in the theatre was the fruit of the violation, or (2) the interest was utilized to further the violation, or (3) the joint ownership would afford the opportunity to perpetuate the illegal effects. *Id.* at 152-53.

More recently, in *FTC* v. *Reynolds Metals Company*, 309 F.2d 223 (D.C. Cir. 1962), the Court of Appeals for the District of Columbia Circuit refused to allow divestiture of a plant acquired after the acquisition because there was no nexus between the property and the violation, and there was no showing that restoration of competition compelled the divestiture. Mr. Chief Justice Burger, then Circuit Judge, said:

> "Divestiture is an extremely harsh remedy, see Timken Roller Bearing Co. *v.* United States, 341 U.S. 593 (1951), and should be decreed as to property obtained by such an acquisition only when necessary to the restoration of the competitive situation altered by the acquisition. See United States *v.* National Lead Co., 332 U.S. 319, 351-352 (1947). If ever *after-acquired* property may be subject to a government order to sell, an even greater necessity, totally absent on the present record, must be shown. Inasmuch as there is a failure on this record to demonstrate (1) any nexus between continued possession of after-acquired property, such as the Torrance plant, and the violation of Section 7, and (2) that restoration of the competitive status quo compels divestiture of such property, that part of the Commission's order requiring divestiture of property built or acquired after the 1956 acquisition of Arrow cannot be sustained." *Id.* at 231.

Here the property to be taken is Ford's own name—Ford did not acquire the right to use its name in connection with or by reason of the acquisition. Ford did not use this right

to further the violation. Ford's right to use its name has no nexus with the violation found.

Moreover, the taking of Ford's name is neither necessary nor appropriate to the restoration of competition. Ford was at all times prior to the acquisition free to use its own name. If the *status quo ante* is to be restored, then Ford must retain its pre-existing right to use its name.

One can but speculate as to the court's reason for denying Ford this right. But the effect of the deprivation is clear. It restrains competition. It hamstrings Ford in Ford's competition in the independent aftermarket. It forces Ford to compete, if at all, in a marketplace wherein each one of Ford's rivals retains that fundamental right of which Ford alone is deprived.

Further, if Ford cannot market Ford-brand plugs, Ford is encouraged to withdraw from the independent aftermarket.[27] If Ford withdraws, its requirements of spark plugs will greatly shrink, and Ford's business will provide little of the support for New Fostoria that the lower court contemplated.

Ford's sales to its independent aftermarket distributors represent the bulk of its requirements. They approximate 100 million plugs per year. (App. 754a, FR-3.) Ford's other requirements are only about 20 million plugs for OE installation and about 15 million plugs for sales to its franchised dealers. (App. 648a-49a, R. Tr. 312; App. 754a, FR-3.) Most of the remainder of the Autolite production (in excess of 100 million plugs) goes to the independent aftermarket other than franchised dealers through warehouse distributors, jobbers and national accounts. (App. 754a, FR-3.) Without its sales in the independent aftermarket, Ford's requirements will decline to approximately 40 million plugs. The judgment requires Ford to buy half its requirements from New Fostoria; but half of 40 million

[27] See note 20 at p. 34 *supra*.

plugs is not significant support for the large fixed-volume Fostoria plant with a capacity of over 175 million plugs per year.

The ban on the use of Ford's own name is further anticompetitive in that it encourages the exclusive sourcing patterns that the court hoped to upset. If all the spark plugs Ford purchases must bear the brand name of the manufacturer and cannot be uniformly labeled with a Ford name, Ford can avoid confusion and inconvenience to its dealers and the public only by buying plugs from a single source. In contrast, if Ford may use its own brand name, it can purchase from more than one manufacturer, simultaneously or successively, and yet preserve the convenience, uniformity and simplicity of a single brand name.

Finally, the restriction on the use of a Ford name will further delay possible entry by Ford into the manufacture of plugs, for Ford will lose valuable lead time necessary to gain acceptance for a new line of plugs.

The ban on Ford's use of its own name is anticompetitive. It serves no proper end. It unfairly penalizes Ford by denying it a fundamental right that has no nexus to the acquisition; a right that its competitors freely exercise in affixing their proprietary names to the parts they install in their vehicles and sell as replacements. Clearly, the ban is "not necessary to the prescription of appropriate relief," and it should be stricken. See *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 411, 414-15 (1945).

c. The requirements provision will restrain competition and involve the court in cumbersome details of administration.

The judgment contains a 5-year mandatory injunction requiring Ford to purchase half its requirements of spark plugs from the buyer of the Fostoria plant, and under the Autolite name. (App. 787a, Final Judgment ¶VI(A).) This ancillary injunction was intended as support for New Fostoria.

The provision is anticompetitive. Divestiture was intended to open an opportunity to competitors to try to supply Ford. The requirements provision substantially withdraws the opportunity. It recreates the relationship that the decree was intended to sever.

Moreover, the provision is not likely to be efficacious as long as Ford is restricted in the use of its own brand name. Unable to market its own brand name plugs, Ford is induced to withdraw from the independent aftermarket.[28] Upon its withdrawal from the independent aftermarket, Ford's requirements would drastically shrink to approximately 40 million plugs, and Ford's business would not provide significant support for New Fostoria.[29]

Even the workability of the requirements provision is highly questionable. Vital engineering and quality standards must be met by spark plug manufacturers. The manufacturer's desire to please and thus retain its customers provides a strong incentive to meet these standards in the ordinary case. Here, however, the court's 5-year mandate will blunt the incentive; for, as to half of its needs, Ford is not allowed to buy elsewhere even if quality should fall. Any lingering incentive of New Fostoria may virtually disappear, and the quality of its plugs may further decline, if New Fostoria anticipates Ford's termination of the relationship at the end of the 5-year term.

The lack of incentive is likely to combine with a lack of the necessary capital. Ford spends a sum equal to 20% of the Fostoria plant's total operating costs for quality control of spark plugs. See p. 52 *infra*. One cannot expect that such a large sum will be available to the new firm. More likely, with substantial unused capacity, New Fostoria will face financial difficulties. Cutbacks in quality control would be a likely first step in a program to reduce expenses.

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[28] See note 20 at p. 34 *supra*.

[29] See pp. 44-45 *supra*.

The problems of workability are likely to devolve upon the judiciary. In order to determine whether New Fostoria's spark plugs "conform to Ford's designs, specifications, quality standards and delivery requirements" (App. 787a, Final Judgment ¶VI(a)), the district court must become involved in continuing technical tests of limited samples, disputes as to meeting of delivery schedules, and similar details. (See App. 75a-76a, Tr. 966-67; App. 721a-725a, R. Tr. 838-39, 844-48; App. 731a-34a, R. Tr. 917-21; App. 745a-50a, R. Tr. 1010-18.)

The prospect of judicial involvement is troublesome. This Court is properly reluctant to impose upon the judiciary the detailed supervision of day-to-day business operations, and has declined to do so. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 160-66 (1948).

The involvement portends an even greater frustration, for the court will be powerless to protect Ford's right to obtain spark plugs of suitable quality if New Fostoria is technically or financially incapable of producing them.

d. Conclusion.

The difficulties and restraints of the ancillary injunctions serve not merely to demonstrate why the injunctions should not stand. They are endemic of the deeper difficulties that pervade the whole plan of relief. They reflect the clear fact that something has gone seriously awry and that the judgment should be reversed and revised.

D. The court misconceived the standards applicable to the fashioning of a Section 7 remedy.

1. The court erred in ordering divestiture without regard to its consequences.

In fashioning relief to remedy a violation of Section 7, the trial court is obliged to order "measures effective to restore competition." *United States* v. *E. I. du Pont de*

Nemours & Co., 366 U. S. 316, 326 (1961). It is the duty of the court to give "'efficacious effect to the prohibitions of the statute . . .'" *Id.* at 327 (quoting *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185 (1911)). This Court has rejected the contention that divestiture is always the proper remedy. *Id.* at 328 n. 9.

In the case at bar the court erroneously viewed divestiture as necessarily most efficacious and as imperative. It ordered divestiture and attempted to support it with drastic ancillary restraints whose very severity proves the unworkability of the basic plan.

Divestiture is often an effective remedy. Often it will restore competition. But it will not do so here. Divestiture here removes the dam that contains the dominant firms. We doubt whether ever before a case concerned with remedies has presented such a spectre of engrossment under the banner of relief. In this matter of first impression where divestiture forebodes restraint, the Court should reject divestiture.

The trial court failed to mould relief to suit the case before it. It rejected a sure and certain plan for increasing actual competition[30] in favor of an experimental gamble that mere potentials might be restored. The court misconceived the law, and the judgment should be reversed.

2. The court erred in trying to transform a historical market structure not created by the acquisition.

Although the court stated that its relief was not "affirmatively" designed to break the OE tie, it nonetheless premised the long term effectiveness of its decree upon redirection of the preference of mechanics and car owners for replacement equipment of the original-parts brands (App.

[30] See pp. 50-51 *infra*.

780a; App. 598a-99a, R. Tr. 121-22; App. 607a-08a, R. Tr. 149-50.)[31]. The court thus attempted to become the architect of what it hoped would be a market reform. Such an attempt was beyond the proper scope of the court's remedial powers.

This Court has rejected relief thus unrelated to the violation. In *United States* v. *National Lead Co.*, 332 U. S. 319, 362 (1947), the Court considered the propriety of a decree intended to remedy misuse of patents. The Government sought a decree that would require defendants to divest themselves of certain plants so that there would be six companies instead of four in the relevant market. The plants were not involved in the misuse, and the Court refused to order the requested relief.

Here, the buying preference attacked by the trial court was neither created by Ford nor caused by the acquisition. It was historically a part of the fabric of the market, long preceding Ford's entry, and indeed is well supported by the technology of the plug.

The attempt at market reform here is particularly inappropriate, since the experiment is to be conducted at the expense of the newest entrant, Ford, and the dominant firms are not subjected to the same experiment. Relief that seeks such drastic reform of market characteristics unrelated to the effects of the acquisition at the expense of the public and the newest competitor should not be allowed to stand.

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[31] The court reasoned that New Fostoria would have an incentive to discourage the OE preference. However, the record establishes that the reverse is the case. Plaintiff's economist testified that if New Fostoria saw a new opportunity to supply Ford's OE requirements, New Fostoria would have the same incentive as do Ford and Champion to promote and preserve the preference (App. 606a-07a, R. Tr. 147; App. 619a, R. Tr. 203.) Thus the court not only erred as a matter of law in treating a weakening of the OE preference as a factor in shaping relief but it erred as a matter of logic in assuming that the separation of New Fostoria from Ford would accomplish the result.

3. The court erred in failing to weigh the risk that its plan would fail and in failing to adopt more efficacious alternatives.

In devising relief, the trial court is obliged to adopt an effective remedy. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 326-28 (1961). The efficacy of relief is not solely a function of what is likely to be accomplished if a plan of relief is successful. The risk that the plan will not work must be balanced against the benefits to be accomplished if it does.

It is clear that the trial court never undertook such a balance. It proceeded on the assumption that divestiture was necessarily most efficacious. When it recognized the difficulties in the creation of a viable new company, it did not even then weigh the risks of divestiture. Rather, it set about to devise and impose elaborate ancillary injunctions, sacrificing the competition of the newest competitor and restraining its potential entry. Thus, the court adopted a plan that had a great risk of failure and that imposed actual and immediate restraints on competition.

In so doing, the court rejected a proposal, submitted by Ford (App. 579a), certain to work and certain to increase actual competition. Ford proposed to preserve present competition and additionally to build up ELTRA into a strong fourth competitor. It would restore ELTRA to its preacquisition production by entering into a long-term contract for the purchase of spark plugs from it and by furnishing ELTRA with equipment that ELTRA lacks. An ELTRA officer testified that, while ELTRA's survival under the Government proposal (substantially adopted by the court) would be improbable, under the Ford proposal ELTRA would be able to play a major role in the expansion of the private brand market, would be able to compete against Champion for private brand and OE customers, and would be able to increase its share of the entire replace-

ment market. (App. 704a-05a, R. Tr. 701-02; App. 707a-13a, R. Tr. 710-13, 716-21, 773-74.)

Other alternatives are likewise more efficacious than the court's order (although less efficacious than the Ford proposal). For example, if this Court should strike the restriction against Ford's manufacture of spark plugs, Ford would be nearer the edge of the market and thus better postured to exert effects of potential competition. At the same time no needed support for New Fostoria would be removed, for the 50% requirements provision would still require Ford to buy half of its needs from the new company; and the lead time necessary for Ford's effective entry would further insulate New Fostoria.[32]

Likewise, a return to Ford of its right to use its own name would enhance competition. Among other things, Ford could continue its full-line aftermarket competition, preserving its large requirements and providing substantial support for New Fostoria. Dual sourcing would become more likely, and the "opportunity to try" to supply Ford would gain more substance. Most importantly, encroachment by the dominant firms would no longer be inevitable.

The court rejected effective relief. It embraced a precarious and drastic alternative. In so doing, it erred.

4. The court erroneously failed to consider pollution control, true efficiencies, and other public and private interests in fashioning relief.

In devising relief, the trial court has "'[t]he duty of giving complete and efficacious effect to the prohibitions of the statute . . . with as little injury as possible to the interest of the general public. . . .'" *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 327-28 (1961) (quoting *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185 (1911)).

[32] See pp. 32-34 *supra*.

The trial court failed to apply this principle. It erroneously disregarded numerous interests of great public and private importance. The relief it ordered not only is not efficacious, but it threatens to cause immediate and irreparable harm to the general public, to several classes of innocent people, and to Ford.

The court disregarded pollution control, efficiencies in quality control and technological advances, the welfare of the hundreds of employees of the Fostoria plant, and injury to automotive competition.

(1) *Pollution control.* Ford has instituted an intensive program to control pollution by controlling emissions. Spark plug design and quality are vital aspects. The prohibition against Ford's in-house sourcing will seriously impair this program (App. 727a-28a, R. Tr. 906-08), will frustrate progress in the control of vehicle emissions, and will injure the public at large. New Fostoria cannot be expected to provide a substitute program. The financial commitments are extensive, the position of the new firm will be uncertain, and the luxury of experimentation in emission control will not be available to it.

(2) *Efficiencies in quality control and technological advances.* Ford has an extensive program for quality control of spark plugs. For this purpose it spends $4.5 million a year, which is 20% of the Fostoria plant's total operating costs. (App. 721a-22a, R. Tr. 838-39.) New Fostoria, with its limited 5-year hold on Ford and a below-capacity plant operation, cannot be expected to make similar expenditures. To the extent that the quality of the Autolite product declines, Ford car owners will suffer and Ford will be injured in automotive competition. (App. 722a-24a, R. Tr. 844-47; App. 732a-34a, R. Tr. 918-20. See App. 627a-29a, R. Tr. 257-60.)

Similarly, New Fostoria cannot be expected to approach the financial commitments of Ford in its continuous

research and development program, and the public and Ford will suffer the results of decelerated technological development.

(3) *The welfare of the City of Fostoria.* The Fostoria plant is the largest employer by far in the City of Fostoria, Ohio. The plant employs 1540 employees and accounts for one-third of the employment in the town. Approximately half of the plant's employees are more than 40 years of age. The plant and its employment affect the finances and capital improvement of the town. The welfare of this entire town is at stake in the gamble that New Fostoria will survive. (See App. 782a.)

(4) *Injury to automotive competition.* The quality of automobile parts directly affects competition in automotive manufacture and sale. Declines in the quality of the spark plug affect the workings of the engine and reduce the quality of the vehicle. By the judgment of the court, Ford loses the right to improve the quality of its plugs. Moreover, it is bound to buy half its plugs from a neophyte firm whose technological ability cannot be assured. Meanwhile, Ford's automotive competitors retain control over the quality of their plugs. Ford is unfairly handicapped in its automotive competition, and the public and Ford will be injured.

Considerations of such serious public injuries should not have been brushed aside. Particularly is this so, where as here: (1) the violation found by the court rests on a purely speculative judgment; (2) the efficacy of the relief ordered, which conflicts with the public good, is itself doubtful; and (3) the considerations proffered deal with true efficiencies, technological advances, and national policies of sufficient import that their disregard would not be conscionable.

Deference to efficiencies and pollution control is of special importance. There is an "enormous social interest in prog-

ress and efficiency. . . ." See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1326 (1965). Efficiencies may be "affirmatively procompetitive" in that ". . . they give promise of putting added pressures on other firms to improve their economic performance." *Id.* at 1328. Mr. Justice Harlan, concurring in *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 581, 597-99 (1967), has recognized that true efficiencies (as opposed to the advertising savings effected by the Clorox acquisition) may properly be considered even in determining the effect of an acquisition on competition.

The immense public interest in pollution control, in technological advance, in the welfare of an entire community, and in competition, is clear. Appellant urges that the trial court erred in dismissing them.

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The judgment in this case was erroneously devised. The public as well as Ford are the victims. The beneficiaries are the two dominant firms who still control 75% of the market. Appellant submits that this injustice should be rectified. The record does not support the finding of violation, but if it should be regarded as doing so, the improper decretal provisions should be eliminated and proper and pro-competitive relief should be devised.

CONCLUSION

Appellant respectfully submits that the acquisition increased competition. The finding of a violation was improper, and it should be reversed. Appellant further urges that the relief ordered by the court will cause disruptive consequences to competition, will undermine the interests of the public, and will unjustly, unfairly and without any proper purpose deprive Ford of basic proprietary rights that its larger competitors enjoy. Divestiture, on these facts, invites engrossment and should not stand. In any event Ford should be allowed the basic rights of grass-roots entry and the use of its own brand name. The efforts by the court below to restructure the industry and penalize Ford should not be allowed.

Respectfully submitted,

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